Public Prosecutor v Tai Mei Yuen

HIGH COURT (PULAU PINANG) — CRIMINAL TRIAL NO 45–20 OF 1999
KAMALANATHAN RATNAM J
23 OCTOBER 2004

Criminal Procedure — Prosecution — Prima facie case — Conflicting testimony of prosecution witness — Whether accused should be given benefit of doubt — Whether there was prima facie case against accused

Evidence — Witness — Conflicting evidence — Clear conflict of prosecution witness evidence — Witness given opportunity to refresh memory — Witness not impeached — Whether benefit of doubt given to accused

PW5 received instructions from ASP Ramli to conduct a raid at Plaza Tol Juru, Butterworth, Pulau Pinang. He testified that he detained a man called Cheng at a car park at Plaza Tol Juru. A pouch bag with small packets of dried leaves suspected to be ganja and a bag containing RM20,000 was found on the passenger seat of the car driven by Cheng. Cheng stated that the money was to be used to pay for heroin which was to be brought to the toll car park. 45 minutes later, the accused arrived at the scene. As the accused approached Cheng's car, he was arrested. The police then searched the accused person's car and found a white plastic bag containing three packets of heroin near the foot pedal. The accused was charged with an offence under s 39B(1) of the Dangerous Drugs Act 1952 (rev 1980) ('the Act'). Cheng was called as prosecution's witness. During his examination-in-chief, he denied he had with him RM20,000 to pay the accused for the heroin. Cheng was later allowed to refer to a statement made by him to refresh his memory. However, under cross-examination, he confirmed the RM20,000 found in his car was not for the purpose of buying heroin.

Held, amending the charge from s 39B(1) to s 39A(2) and sentencing the accused to 12 years' imprisonment with minimum 10 strokes of the rotan; sentence to run from date of arrest:

(1) There must be a demonstrated need for the witness to refer to a memory-refreshing document and that it would not be proper to grant leave to refer to such a document simply because a request was made by the prosecution (*Yuen Chun Yii v PP* [1997] 3 SLR 57). The court was satisfied that there was a need for the witness to refresh his memory before the prosecution could proceed to apply to impeach the witness because this incident had occurred six years ago (see para 14).

(2) When there is clear conflict of evidence in the prosecution's case, the benefit of doubt must be given to the accused. Even more so, when the prosecution witness was given an opportunity to refresh his memory and the prosecution accepted his explanation and did not proceed to impeach the witness (see para 15).

(3) The evidence of the prosecution that the offending drugs were found at the floor board of the car had been sufficiently challenged by the defence. The accused refused to sign the search list and the court gave

credence to this explanation. Further on a perusal of the photographs it would be difficult for the accused to have been driving the car with the package placed in such a position (see para 16).

(4) The prosecution had failed to prove a prima facie case against the accused for a charge under s 39B(1) of the Act. However, there was a prima facie case against the accused under s 39A(2) of the Act (see para 17).

[Bahasa Malaysia summary

PW5 telah menerima arahan daripada ASP Ramli untuk mengendalikan satu serbuan di Plaza Tol Juru. Beliau telah memberi keterangan bahawa beliau telah menahan seorang bernama Cheng di tempat letak kereta di Plaza Tol Juru. Satu dompet dengan beberapa paket daun yang kering yang disyaki ganja dan beg mengandungi RM20,000 telah dijumpai di atas tempat duduk penumpang kereta yang dipandu oleh Cheng. Cheng berkata bahawa duit tersebut adalah untuk membayar heroin yang akan dibawa ke tempat letak kereta tersebut. 45 minit kemudian, tertuduh sampai di tempat kejadian. Semasa beliau mendekati kereta Cheng, beliau ditangkap. Polis memeriksa kereta tertuduh dan menjumpai satu beg plastik putih yang mengandungi tiga paket heroin dekat injak-injak. Tertuduh dituduh di bawah s 39B(1) Akta Dadah Berbahaya 1952 (semakan 1980) ('Akta tersebut). Cheng dipanggil sebagai saksi pendakwa. Semasa pemeriksaan utama, beliau menafikan yang beliau mempunyai RM20,000 pada dirinya untuk membayar tertuduh untuk heroin tersebut. Cheng kemudiannya dibenarkan untuk merujuk kepada pernyataan yang dibuat olehnya bagi memperingatkan semula ingatannya. Tetapi, semasa pemeriksaan balas, beliau mengesahkan bahawa wang RM20,000 yang dijumpai di dalam keretanya adalah bukan untuk tujuan membeli heroin.

Diputuskan, meminda tuduhan daripada s 39B(1) kepada s 39A(2) dan menghukum tertuduh 12 tahun penjara dengan minima 10 sebatan rotan; hukuman penjara bermula daripada tarikh tangkapan:

(1) Ia mesti ditunjukkan bahawa terdapat keperluan untuk seorang saksi merujuk kepada dokumen yang boleh memperingatkan semula ingatan dan tidak betul untuk memberi kebenaran untuk merujuk kepada dokumen itu hanya kerana pihak pendakwaan memohon (*Yuen Chun Yii v PP* [1997] 3 SLR 57). Mahkamah berpuas hati bahawa terdapat keperluan untuk saksi mengingatkan semula sebelum pihak pendakwaan memohon mencabar saksi kerana peristiwa ini berlaku enam tahun dahulu (lihat perenggan 14).

(2) Apabila terdapat percanggahan keterangan yang jelas di dalam kes pendakwaan, faedah kesangsian mestilah diberikan kepada tertuduh. Lebih-lebih lagi, apabila saksi pendakwaan diberi peluang memperingatkan semula ingatannya dan pendakwa menerima penjelasan beliau dan tidak mencabar saksi tersebut (lihat perenggan 15).

(3) Keterangan pihak pendakwaan bahawa dadah itu dijumpa di papan lantai kereta itu telah dicabar dengan secukupnya oleh pihak pembelaan. Tertuduh enggan menandatangani senarai geledah dan mahkamah mempercayai penerangan beliau, Pada penelitian fotograf-fotograf ia sukar untuk tertuduh memandu kereta dengan bungkusan diletakkan seperti itu (lihat perenggan 16).

(2) Pihak pendakwaan gagal membuktikan kes prima facie case terhadap tertuduh untuk tuduhan dibawah s 39B(1) Akta tersebut. Akan tetapi, terdapat kes prima facie terhadap tertuduh di bawah s 39A(2) Akta tersebut (lihat perenggan 17).]

Cases referred to

Yuen Chun Yii v PP [1997] 3 SLR 57 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 39A(2), 39B(1)

Notes

For cases on prima facie case see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2574-2577.

For cases on conflicting evidence of witness, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2526-2527.

For examination of witnesses, see 12 *Halsbury's Laws of Malaysia*, paras [210.161]–[210.176].

For procedure after conclusion of case for prosecution, see 18 *Halsbury's Laws of Malaysia*, para [310.323].

Tuan Abdul Razak bin Musa (Deputy Public Prosecutor) for the prosecution.
V Sithambaram (Sitham & Associates) for the accused.

Kamalanathan Ratnam J:

Facts

[1] The accused faced the following charge:

> 'Bahawa kamu pada 29 April 1998, jam lebih kurang 11.45 malam, di tempat letak kereta Plaza Tol Juru, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya, iaitu 123g campuran heroin dan monoacetylmorphines (48g heroin dan 75g monoacetylmorphines), dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s 39B(2) Akta yang sama.'

[2] This case was initially heard by Abdul Kadir Musa J who had completed the testimony of five witnesses. He was then transferred. Upon the directive of the Chief Judge Malaya, I continued with the case with the notes of evidence so far recorded by the learned judge marked as an exhibit.

The evidence

[3] PW1 and PW2 were the police photographers. PW3 was the store keeper who was in charge of the exhibits at the police station. PW4 was the officer from the Road Transport Department who confirmed that a motorcar WDW 6399 was registered in the name of the accused from 2 August 1996 to the date he testified. The fifth witness was Chief Inspector Chang (PW5). He testified that on 29 April 1998 he received instructions from one ASP Ramli to conduct a raid at Plaza Tol Juru, Butterworth, Pulau Pinang. The party comprised ten persons, three of whom including himself were officers. As soon as he had arrived at the toll, he detained a male Chinese who was seated in a motorcar number ABS 1661 parked at the car park. ASP Ramli then examined the person and found nothing on him. However from a pouch bag found on the front passenger seat, he discovered small packets of dried leaves which they suspected to be ganja. He also found RM20,000 in the bag. They then took the person named Cheng to a place behind the TNB Station near the toll for interrogation. Cheng then informed ASP Ramli that the money was to be used to pay for heroin which was to be brought to the toll and to be handed to him at the car park. PW5 confirmed that he spoke to Cheng in Chinese. Upon receipt of that information he and part of the raiding party then set up ambush at the car park.

[4] After a wait of 45 minutes they saw motorcar WDW 6399 driven by a male Chinese. This person then parked his car and walked towards motorcar ABS 1661. At that moment the raiding party arrested this person. At that time Cheng was not in the car but was behind the TNB Station being guarded. The witness identified the accused as the person driving motorcar WDW 6399. He then read the cautioned statement to the accused in Bahasa Malaysia and immediately translated it to the accused in Hokkien. The accused understood the explanation. He had recorded all this. He then related the statutory warning he had given. They then examined motorcar WDW 6399. Near the foot paddle he found a white plastic bag.

[5] Upon opening the said bag they found three packets wrapped in Chinese newspaper. Upon opening the package they found a white plastic bag inside which they found what was suspected to be heroin. They also found in the car,

(a) Southern Bank bank book;

(b) Thai currency 40,000 bahts;

(c) a border pass to Thailand in the name of the accused;

(d) the registration book of the car WDW 6399 registered in the name of the accused;

(e) a registration card in the name of Yuen;

(f) a registration book of a motorcycle;

(g) a cheque drawn on Public Bank.

[6] All these items were found inside the glove compartment of the said car. The witness then informed the court that before the accused was arrested and the exhibits confiscated the accused pleaded with ASP Ramli to settle the matter by offering to pay them a sum of RM300,000. After some objections by counsel my learned brother recorded that the statement was only allowed for the purposes of showing the conduct and not as to the truth of the statement. From there they went back to the police station with the accused together with all the exhibits including both the vehicles. Both the accused and the cars were then handed over to the investigating officer of the case. ASP Ramli also made a police report. On the way, with consent, the accused made a phone call. Thereafter some bargaining took place and then a settlement was reached. They together with the accused then left for Ipoh. They reached the Plaza Tol Ipoh Selatan, Simpang Pulai and parked at the car park. The accused was then allowed to make a phone call using his own handphone. About five minutes later they were approached by a male Chinese who asked ASP Ramli where his friend was in Bahasa Malaysia. When ASP Ramli pointed to motorcar WDW 6399 in which the accused was, this person walked towards the car. After talking to the accused he went back to his car and returned to the accused's car carrying a paper bag which he handed over to the accused which the accused handed to ASP Ramli. When the bag was opened they saw a mixture of notes in RM1000, RM500, RM100, RM50, RM10 and RM5 denomination. Immediately thereafter, ASP Ramli informed this male Chinese that he had committed an offence by bribing the police and arrested him. The bag of money amounting to RM147,000 was seized and a report lodged at the Ipoh Police Station. After this they returned to Penang. The handphone the accused had used to make the call was also produced.

[7] To a defence question under cross-examination he said he did not know if the accused and Cheng were charged at the Magistrate's Court at Bukit Mertajam for trafficking in drugs relating to the same exhibits.

[8] I then took over this case from this stage with the continued cross-examination of PW5. He confirmed that before Cheng gave a statement to ASP Ramli, he was not given any statutory warning. He also confirmed that no photographs were taken of the exhibit as found near the foot paddle of Cheng's car. He denied a defence suggestion that the exhibit was recovered from under the driver's seat. He also denied a defence suggestion that they did not discover the sum of RM20,000 inside Cheng's car. To a suggestion that the accused only spoke Cantonese and not Hokkien, PW5 reiterated that he first asked the accused in what dialect he wished to speak and the accused chose Hokkien. He confirmed that he knew that the person who had offered the money as a bribe was acquitted and discharged. He denied the suggestion that Cheng was an informer. The defence also managed to tender as its exhibit (D23) an insurance receipt in the name of one Tan Peng Cheng and an electric bill (D23) in the name of one P'ng Lip Teck. However these two exhibits were not listed in the search list although to a question from the court the witness confirmed that he found them in the glove compartment together with the other exhibits. He also confirmed that he did not know who else had used the car prior to the arrest.

[9] The next witness (PW6) was Sup Ramli. He confirmed that he was the head of the raiding party on the material date. His story corroborated that of PW5. However he stated that as soon as the police had arrested Cheng and had interrogated him, Cheng had informed him that he was waiting for a friend who would be bringing heroin.

[10] At this stage defence counsel objected contending that any statement made by a person under arrest when no statutory caution had been given is inadmissible. The learned deputy replied saying that Cheng was not the accused in this case and that therefore his statement could not be rendered inadmissible. The learned deputy argued that the issue was not related to voluntariness but whether it was hearsay and he assured the court that he was making efforts to call Cheng. I then made the following ruling:

(1) the issue was not voluntariness because that would only apply if the person making the statement was charged. In this case the person who made that statement was not the accused;

(2) the issue is whether the statement made was hearsay. If Cheng was not called I would rule that as hearsay and inadmissible;

(3) I also ruled that not only would it be inadmissible but I would also not admit it on the basis that it was said.

[11] The case then continued with the witness relating the facts as stated by PW5. He identified the accused as the person in whose car the heroin was found. Under cross-examination he denied counsel's suggestion that Cheng was not carrying RM20,000. He also agreed that the accused had refused to sign the search list but he disagreed with counsel's suggestion that the accused refused to sign because the package of drugs was not found near the foot paddle. He also denied the defence suggestion that the accused offered a bribe in order to settle his arrest. He also confirmed the defence suggestion that initially Cheng was charged with the accused for trafficking. He also denied the defence suggestion that the drugs were found below the driver's seat. The chemist then confirmed that the drugs she received in relation to this case for analysis were found to be heroin and monoacetylmorphine as defined in the Dangerous Drugs Act 1952. The investigating officer under cross-examination admitted that he had not investigated nor had he taken any statement in respect of D22 and D23 and he also confirmed that the respective addresses of both the persons named therein were in the documents. He also did not investigate how those two documents belonging to two different persons had come to be in the glove compartment of the said car. He also could not tell if any one of those two persons had been in possession of the said car before the arrest of the accused.

[12] At this stage counsel asks for the accused's cautioned statement to be admitted into evidence. It was tendered and marked as D35. In that statement he had stated that his car had been parked in front of his house where there was no fence and that his car had not been locked. He also did not know that the deceased's brother and his eldest son always used the said car.

[13] The learned deputy then called Cheng as his tenth witness. He confirmed that on the material date he had driven motorcar ABS 1661 and was at the Juru Toll. He testified that after he had taken heroin he was drowsy and he slept in the car at the Juru Toll. He denied telling the police anything. He knew the accused from their younger days. The last time he had seen the accused was about two to three years before his arrest. On the date of arrest he had spoken to the accused over the telephone but they had not decided to meet each other. After his arrest he saw the accused also under arrest. He did not know that on that date the accused had wanted to meet with him. He confirmed that he was charged for possession of ganja and was fined RM2,000. He denied having informed the police that he had with him RM20,000 which was as payment for the heroin he was to receive from his friend.

[14] At this stage the learned deputy asked the accused if he wished to refresh his memory pursuant to s 159 of the Evidence Act 1950. I was then referred by the defence to the case of *Yuen Chun Yii v PP* [1997] 3 SLR 57 at p 63 and to Yong CJ's views. The learned Chief Justice had held that there must be a demonstrated need for the witness to refer to a memory-refreshing document and that it would not be proper to grant leave to refer to such a document simply because a request was made by the prosecution. I ruled that I was satisfied that there was a need for the witness to refresh his memory before the prosecution could proceed to apply to impeach the witness because this incident had occurred six years ago. After the interpreter had explained the statement in Cantonese to the witness he proffered his explanation. The learned deputy then expressed his satisfaction at the explanation except that he asked if the reference to 'Pek Hoon' meant heroin, and the witness agreed. Under cross-examination, he confirmed giving a statement that he did not go to the Juru Toll for the purposes of meeting with the accused. He also confirmed that he had no knowledge of any facts relating to the seized drugs. He also confirmed that the RM20,000 found in his car was not for the purpose of buying heroin. He also confirmed that the statement that was shown to him for purposes of refreshing his memory was given by him after he was arrested and released in respect of this same case. At this stage learned defence counsel asked that the original charge in the magistrate's court which was in the court file be admitted and marked as an exhibit. Since the learned deputy had no objection I marked the original charge as exh D36. With this witness the prosecution closed its case and offered eleven (11) other witnesses to the defence.

Findings of the court

[15] The evidence of PW5 and PW6 that Cheng was waiting at Juru Toll for the accused with RM20,000 as payment for the heroin that the accused was transporting was nullified by Cheng's own denial. Cheng was also a prosecution witness. When there is clear conflict of evidence in the prosecution's case itself the benefit of the doubt must be given to the accused. This is even more so when Cheng was given an opportunity to refresh his memory and the prosecution accepted his explanation and did not proceed with its desire

to impeach Cheng. Besides the word 'dia' in the statement has not been shown to refer to the accused. He was not even asked this in examination in chief.

[16] As for the contention of the prosecution that the offending drugs were found at the floor board of the car this evidence had been sufficiently challenged by the defence. The accused refused to sign the search list contending that he refused to acknowledge the statement that the drugs were found at the floor board. Surely the court must give credence to this explanation. Further on a perusal of the photographs it would be difficult for the accused to have been driving the car with the package placed in such a position. After all if he had knowledge of what it was, why inconvenience himself by putting it on the driver's side. He could have at least placed it on the passenger's side. Referring to the cautioned statement learned counsel pointed out that when asked if he knew what was in the package that was found in the car, the accused replied that he did not. He also stated that it was the police who told him what was inside the package. When the learned deputy submitted he indicated that there was a clear case under s 39A(2) of the Act.

[17] I then held that at the close of the case for the prosecution and after subjecting the available evidence before me to the maximum evaluation test, the prosecution had failed to prove a prima facie case against the accused for a charge under s 39B(1) of the Act. However I found that there was a prima facie case against the accused under s 39A(2) of the Act. I then amended the charge to read as follows:

> 'Bahawa kamu pada 29 April 1998, jam lebih kurang 11.45 malam, di tempat letak kereta Plaza Tol Juru, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah memiliki dadah berbahaya iaitu 123g heroin dan monoacetylmorphines (48g heroin dan 75g monoacetylmorphines) dan dengan itu kamu telah melakukan satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 (semakan 1980) dan boleh dihukum di bawah s 39A(2) Akta yang sama.'

[18] The three alternatives were explained. The accused then pleaded guilty to the amended charge and indicated that he understood the nature and consequences of his plea of guilt.

[19] In mitigation counsel pleaded that he had been on remand for six years which itself was a deterrent punishment. After his arrest his wife had divorced him. He has three children but only his daughter had been visiting him in prison. His youngest child is 14 years old and is still schooling. He has truly repented after realising that the life he had led had destroyed his family. Counsel prayed for the minimum mandatory strokes and pleaded for a sentence of between 9 to 10 years as fair and appropriate.

[20] The learned deputy gave a short submission. He confirmed that there were no previous convictions. He cited cases where the court had given 15 years with 10 strokes.

[21] Having heard both counsel I sentenced the accused to 12 years in prison and gave him the minimum 10 strokes of the rattan with the sentence to run from the date of his arrest. I took into consideration the fact that the

accused had pleaded guilty and had saved the court's time. I also took into consideration that the accused must have known when he pleaded guilty, that the court could impose the maximum sentence. Yet he threw himself at the mercy of this court and was prepared to accept this court's decision. It is therefore proper that where repentance and remorse had been shown by an accused person with total submission to the discretion of the court, the court too must tamper justice with mercy.

Charge amended from s 39B(1) to s 39A(2) and the accused sentenced to 12 years' imprisonment with minimum 10 strokes of the rotan; sentence to run from date of arrest.

Reported by I Izzuddin